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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL KATZ-LACABE, ET AL.,

Plaintiffs,

v.

ORACLE AMERICA, INC., a corporation organized under the laws of the State of Delaware,

Defendant.

Case No. 3-22-cv-04792-RS

DEFENDANT ORACLE AMERICA, INC.'S RESPONSE TO OBJECTIONS TO THE SETTLEMENT

Judge: Hon. Richard Seeborg

Date: November 14, 2024
Time: 1:30 p.m.
Courtroom: 3

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Trial Date: Not Set

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I. INTRODUCTION

Oracle submits this response to certain objections to the Settlement[1] filed by proposed Settlement Class Members. Specifically, this response addresses (i) certain objectors' failure to consider litigation risks in their objections to the scope of monetary relief provided in the Settlement, (ii) others' misunderstanding of the advertising technology (AdTech) industry and Oracle's business practices, and (iii) another's misguided objection to the Claim Form's attestation under penalty of perjury requirement.

II. ARGUMENT

A. The Settlement is Fair Given the Litigation Risks

Objectors challenging the reasonableness of the monetary relief provided in the Settlement ignore the risks of continued litigation. Certain objectors argue that the per-claimant value of the Settlement is too small based on their assumption that the ***entire class*** will file a valid claim. (*See* Loeb Objection, ECF No. 146 at 1 ("[if] . . . the class contains 220 million U.S. persons . . . what remains is less than $.35 per class member"); Henry Objection, ECF No. 157 at 1 ("the net settlement amount . . . [d]ivid[ed by] the number of plaintiffs . . . equals to $0.39 cents per Class Member"); Trupia Objection, ECF No. 164 at 2 (similar); Stanek Objection, ECF No. 163 at 1 (similar).) Others argue that monetary relief provided in the Settlement does not reflect their subjective assessments of the value of their own personal information. (*See* Zaffarkhan Objection, ECF No. 141 at 1 ("As a physician and high net worth individual, my personal information has far greater value than the class action intimates."); *see also* Epelbaum Objection, ECF No. 156 at 1 (claiming that Oracle "earn[ed] billions of dollars from [its data collection] practices"); Kelley Objection, ECF No. 172 at 1 ("the penalties . . . amount to a mere slap on the wrist").) Finally, others claim that monetary relief is unreasonable in relation to the maximum possible damage award associated with the at-issue causes of action. (*See* Williams Objection, ECF No. 148 at 3 ("Using the $10,000 maximum [ECPA damage award], the . . . class members who submit a claim form will be receiving **0.25%** of their maximum damages."); Feldman Objection, ECF No.

[1] Unless otherwise defined, capitalized terms are as defined in the Settlement Agreement and Release. (*See* ECF No. 132-2 ("Settlement").)

150 at 7 (urging the Court to compare the proposed settlement value to the "*maximum amount* that would not violate due process").)

But "[s]ettlement is the offspring of compromise," and courts must determine "not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In determining what constitutes a fair settlement, courts consider "the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *Browne v. Am. Honda Motor Co.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499072, at *12 (C.D. Cal. July 29, 2010). Accordingly, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citation omitted).

Here, the Agreement constitutes a fair settlement in light of the significant challenges Plaintiffs would face in attempting to prove their claims. As to Plaintiffs' wiretapping claims, Plaintiffs would struggle to demonstrate that Oracle's alleged data collection took place while individuals' data was "in transit." *See, e.g.*, Cal. Pen. Code § 631(a).[2] Courts have routinely held that data that is transmitted from electronic storage does not constitute an interception "in transit." *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (concluding an interception in transit must "stop, seize, or interrupt in progress or course before arrival" and before it is in "electronic storage") (citation omitted); *see also Bunnell v. Motion Picture Ass'n of Am.*, 567 F. Supp. 2d 1148, 1152 (C.D. Cal. 2007) (no interception in transit "[e]ven if the storage phase is transitory and lasts only a few seconds"). And as to Katz-Lacabe's privacy claims under California law, Oracle intended to seek summary judgment on the grounds that its lawful

[2] The California Invasion of Privacy Act's "in transit" requirement is construed coextensively with the federal Electronic Communications Privacy Act's "contemporaneous with transmission" requirement, and by extension, the Florida Security of Communications Act (FSCA). *See In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1226, 1228 n.9 (C.D. Cal. 2017); *see also Jacome v. Spirit Airlines Inc.*, No. 2021-000947-CA-01, 2021 WL 3087860, at *6 (Fla. Cir. Ct. June 17, 2021) (same "contemporaneously with transmission" requirement under the FSCA as under ECPA).

practices cannot constitute a "highly offensive" intrusion. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020) (citation omitted). Indeed, courts agree that engaging in the "routine commercial behavior" of a data broker does not satisfy the "highly offensive" inquiry. *Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1090 (N.D. Cal. 2022); *see also In re Google, Inc. Priv. Policy Litig.*, 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014) (Google's collection and disclosure of users' browsing histories was not highly offensive).

In addition, Plaintiffs would have faced further obstacles in attempting to certify a class for litigation purposes. *See Fraley v. Facebook*, Inc., 966 F. Supp. 2d 939, 942-43 (N.D. Cal. 2013) (Seeborg, J.) (granting final approval of class settlement and finding "significant risk . . . that class certification would prove unwarranted" were litigation to proceed), *aff'd*, *Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016); *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *5 (N.D. Cal. Feb. 16, 2016) (settlement amount fair given that "[p]laintiffs may have had difficulty in certifying a class"). At class certification, Oracle would have argued that a litigation class is improper due to a myriad of individualized issues, including as to each class member's consent to Oracle's alleged data collection practices through the "diversity of disclosures" made in cookie banners and cookie policy statements across Oracle's customers' websites. *See In re Google Inc. Gmail Litig.* ("*In re Gmail*"), No. 13-MD-02430-LHK, 2014 WL 1102660, at *15 (N.D. Cal. Mar. 18, 2014) (denying certification of wiretapping claims given "diversity of disclosures" to end users); *Sherman v. Yahoo! Inc.*, No. 13cv0041-GPC-WVG, 2015 WL 5604400, at *10 (S.D. Cal. Sept. 23, 2015) ("individualized inquir[ies]" necessary to "determine the consent profile of each putative class member" given "various methods of expressing consent"); *Hart v. TWC Prod. & Tech. LLC*, No. 20-CV-03842-JST, 2023 WL 3568078, at *11 (N.D. Cal. Mar. 30, 2023) ("factual questions of whether users viewed any of these materials . . . necessitate individualized factual inquiries that necessarily predominate"); *In Re Gmail*, 2014 WL 1102660, at *18 (implied consent inquiry requires evaluating "whether each individual 'knew about and consented to the interception' based on the sources to which [they were] exposed") (quoting *Berry v. Funk*, 146 F.3d 1003, 1011 (D.C. Cir. 1998).

Faced with "significant risk" of summary judgment against their claims and "that class

certification would prove unwarranted," Plaintiffs' agreed-upon Settlement Fund is fair and should be approved. *Fraley*, 966 F. Supp. 2d at 942-43.

B. Objectors' Misunderstanding of Oracle's Business Practices Does Not Implicate the Settlement

Certain other objectors attack the fairness of the settlement based on a misconception of Oracle's advertising business and the focus of this litigation. Based on Plaintiffs' baseless allegations that Oracle compiled and sold "digital dossiers" containing individuals' sensitive personal information, several objectors argue that additional information is necessary on Oracle's supposed "compilation of shielded medical files" and its purported plans to provide "extensive surveillance" for government actors through allegedly "criminal" means. (Myers Objection, ECF No. 139; Loeb Objection, ECF No. 146 at 1-2 (alleging Oracle's data collection violates the Computer Fraud and Abuse Act); *see also* Rothfeder Objection, ECF No. 166 at 1 (claiming to be affected "mentally, emotionally, and financially" by alleged conduct). Others object based on their misunderstanding that this litigation involves a data breach of their sensitive information, claiming that relief should include credit monitoring or otherwise account for "long-term security risks" and "increased vulnerability to fraud." (Burdick Objection, ECF No. 140 at 1; *see also* Casler Objection, ECF No. 160 at 3 (requesting "lifetime identity theft protection service"); Ubiles Objection, ECF No. 158 at 1 ("seeking lifetime data protections and credit monitoring services").)

These objectors fundamentally misunderstand the AdTech industry in which Oracle operated and do not suggest that the Settlement is unfair. *See Californians for Disability Rts., Inc. v. Cal. Dep't of Transp.*, No. C 06-5125 SBA, 2010 WL 2228531, at *2 (N.D. Cal. June 2, 2010) ("If objections are filed, the district court is to evaluate whether they suggest serious reasons why the settlement proposal might be unfair."). As Plaintiffs admit, Oracle creates advertising segments that may convey general consumer preferences (*e.g.*, "in-market for cars") associated with an ***anonymous*** device identifier. (*See* ECF No. 88-1, Ex. B at 8; *see also* ECF No. 87 ("SAC") ¶¶ 74-76.) Plaintiffs also admit these business practices are commonplace and are expressly contemplated and permitted by statute. (*See* SAC ¶¶ 21, 26, 39, 89, 105 (citing Cal.

Civ. Code § 1798.99.80, which defines data brokers like Oracle as entities permitted to collect and sell to third parties the personal information of consumers with whom they have no direct relationship).)[3]

The reports that Plaintiffs reference in multiple versions of the Complaint, Offline Access Request Response Reports (OARRRs), do not suggest otherwise or imply that Settlement Class members' sensitive personal data has been sold or otherwise made public. These reports are generated solely for purposes of complying with the California Privacy Rights Act in response to a consumer request. *See* Cal. Civ. Code § 1798.110. Given the generally anonymous nature of the data retained by Oracle, the reports merely provide the advertising segments associated with identifiers that ***may be*** associated with the individual requesting the report. Contrary to concerns raised in certain objections, Oracle does not sell or disclose the OARRRs (or any other purported personally identifying "profiles") to third parties. Further, the reports do not reflect online interest segments reflecting "precise mental or physical health, biometric, or genetic information, such as a certain sensitive medical condition." Oracle does not create such segments, as disclosed in its Privacy Policy.[4]

Misconstruing Oracle's business practices, these objectors do not "suggest serious reasons why the [Settlement] might be unfair" and their objections should be denied. *Californians for Disability Rts.*, 2010 WL 2228531, at *2.

C. The Claim Form's Attestation Requirement Is Reasonable

Another objector, Erwin Rosenberg, suggests that the Claim Form's attestation under penalty of perjury requirement deterred Settlement Class Members from submitting claims. (*See* Rosenberg ECF No. 143 at 1.) The Claim Form requests an attestation that, to "the best of

[3] Neither are Oracle's lawful business practices in violation of the CFAA. The statute was "enacted to prevent intentional intrusion onto someone else's computer"—*i.e.*, "computer hacking"—and not the sale of anonymized advertising segments. *HiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1196 (9th Cir. 2022). Indeed, courts routinely dismiss CFAA claims where plaintiffs cannot allege "harm to computers or networks" but instead claim damages based on the alleged "economic harm due to the commercial value of the data itself." *See, e.g.*, *Ji v. Naver Corp.*, No. 21-cv-05143-HSG, 2023 WL 6466211, at *11 (N.D. Cal. Oct. 3, 2023) (citation omitted); *see also NetApp, Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 834 (N.D. Cal. 2014) (collecting cases).

[4] Oracle Advertising Privacy Policy, https://www.oracle.com/legal/privacy/advertising-previous-privacy-policy-041024/ (last accessed Oct. 31, 2024).

[Claimant's] knowledge . . . [a]ny acquisition, capture, or collection" of the Claimant's "personal information by Oracle" was "without [their] consent." (ECF No. 132-2, Ex. A.) He argues this language is "improper" for two reasons (i) "consent is not necessary to make a claim in this case," and (ii) one "may not know whether he consented" when "clicking on a pop-up about tracking and/or cookies." (ECF No. 143 at 1.) Neither objection is persuasive.

First, the attestation that Claimant did not consent to any data collection by Oracle is appropriate because consent is a complete bar to the claims asserted in this lawsuit.[5] Rosenberg erroneously argues that claims under the FSCA can survive even if a plaintiff consents to Oracle's collection. (*See* ECF No. 143 at 1 (citing the Court's October 3, 2023 motion to dismiss Order (ECF No. 77 at 10 n.10) which concludes noting the "FSCA does not require a reasonable expectation of privacy in electronic communications").) But Rosenberg confuses a reasonable expectation of privacy with consent, which is an explicit statutory defense. *See* Fla. Stat. Ann. § 934.03(3)(d) ("It is lawful under this section . . . for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.").

Second, Claim Forms may appropriately require Claimants to attest to relevant and known facts under penalty of perjury to the best of their knowledge. *See California v. IntelliGender, LLC*, 771 F.3d 1169, 1175 (9th Cir. 2014) (noting district court granted final approval to settlement, where claim form required attestation under penalty of perjury); *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872, at *2 (N.D. Cal. Nov. 3, 2009) (granting final approval to settlement, when claim form required attestation under penalty of perjury). Web users may consent to Oracle's data collection practices through their acceptance of cookie banner and pop-up terms on Oracle customers' websites. Although this information should be within the knowledge of each Settlement Class Member, in the case of any uncertainty, the attestation here is made to "the best of [one's] knowledge" and does not require evidentiary proof. Such an

[5] *See Hart*, 2023 WL 3568078, at *9 (no reasonable expectation of privacy under California law where plaintiffs manifest through their actions "a voluntary consent to the invasive actions of defendant") (citation omitted); Cal. Pen. Code § 631(a) (prohibiting eavesdropping "without the consent of all parties to the communication"); Fla. Stat. Ann. § 934.03(2)(d) (same).

attestation is appropriate to verify eligibility for a monetary benefit under the Settlement.

III. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court overrule the objections to the Settlement.

Dated: October 31, 2024

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